A

## DUTA WAJAR SDN BHD v. PASUKHAS CONSTRUCTION SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ARIFF YUSOF JCA
MOHD ZAWAWI SALLEH JCA
B IDRUS HARUN JCA
[CIVIL APPEAL NO: W-02-124-01-2014]
24 DECEMBER 2014

C ***CONTRACT:*** *Breach – Agreement – Claim for works rendered – Subcontract agreement entered for piling works – Contractor failed to make payments claimed by subcontractor after completion of piling works – Defects in piling works – Allegation of – Whether subcontractor informed about defects – Whether payment for piling works subject to back-to-back payment arrangement – Whether parties entered into agreement – Whether subcontractor signed agreement – Whether*
D *parties bound by agreement*

***CIVIL PROCEDURE:*** *Res judicata – Parties and issues same as in previous application – Claim for payments for piling works rendered – Matter decided in another suit – Whether parties precluded from raising same issues – Whether res judicata applicable*

E

After being awarded with a construction project by one MTM Millenium Holdings Sdn Bhd ('the employer'), the respondents appointed the appellant as the subcontractor to carry out the piling works. Due to the respondents' failure to make payments for three progress claims by the appellant in the
F amount of RM1,433,500.10, the latter filed a claim for the said amount in the High Court. The respondents refuted the claim by contending that there were defects in the piling works and canvassed their argument further on the subcontract agreement ('the agreement') which was allegedly entered into by the parties. The respondents submitted that according to the agreement, the payment for the piling works was subject to back-to-back payment arrangement
G where the appellant would only be paid after the respondents received interim payments from the employer. It was not disputed the proposed agreement was sent to the appellant only after the appellant submitted its first claim. The letter, which enclosed the proposed agreement, required the appellant to sign and return the copies of the same to the respondents.
H However, the appellant did not agree with the terms of the proposed agreement and for that reason, did not sign nor return the same to the respondents. The High Court dismissed the claim and hence, the present appeal. The issue that arose for the court's determination was whether the unsigned agreement had bound the parties.

I

**Held (allowing appeal; setting aside judgment of High Court)**
**Per Idris Harun JCA delivering the judgment of the court:**

**(1)** The terms, as proposed in the agreement, in fact and in law, did not constitute a valid binding agreement between both parties. The appellant was under no obligation to accept terms that it could not agree to. Such proposed agreement in law remains only as a draft without any legal effect. (para 8)

**(2)** The issue relating to the agreement had already been fully ventilated by the respondents and had been determined in *Duta Wajar Sdn Bhd v. Pasukhas Construction Sdn Bhd & Anor* [2012] 4 CLJ 844. The principle of *res judicata* applied to the present appeal and the respondents were precluded from raising the same issue for the second time in the same suit. (para 13)

**(3)** The respondents' defence of the alleged back-to-back payment or pay-when-paid arrangement was based wholly on the proposed agreement and nothing else. There was not one shred of evidence which could support the respondents' case on this issue. Since the appellant refused to sign the proposed agreement, the logical conclusion that could be drawn from this act was that there was no written agreement in existence based on the alleged back-to-back payment arrangement between the parties. (para 12)

**(4)** There was no evidence to show that the parties had agreed on any specified period or time during which the respondents were required to pay for the three progress claims made by the appellant or whether it was the intention of the parties to make time as the essence of the contract so that the case could plainly come within the ambit of s. 56(1) of the Contracts Act 1950. In the absence of such evidence, this case appeared to indicate that time was not of the essence of the contract and accordingly, the general principle of contract law enjoined the execution of the contract to be carried out within a reasonable time. Since the appellant had performed the agreement with sufficient promptitude and submitted three progress claims on three different occasions, it behoves the respondents in law to honour the agreement by paying the appellant within a reasonable time. (para 17)

**(5)** The respondents, by their conduct, had acknowledged that the piling works were satisfactorily carried out by the appellant. During the progression of the piling works, the respondents did not raise the issues of defective piling works. Instead, they maintained a deafening silence. The respondents cannot now turn around and say that the piling works were defective. Furthermore, the respondents' defence was further weakened by its failure to adduce any evidence or produce any particulars of or tender any reports of consultants or experts showing the alleged defects. (paras 20, 21, 22 & 24)

***Bahasa Malaysia*** *Translation of Headnotes*

Selepas diawardkan dengan projek pembangunan oleh sebuah syarikat yang dikenali sebagai MTM Millenium Holdings Sdn Bhd ('majikan'), responden-responden telah melantik perayu sebagai subkontraktor untuk menjalankan kerja-kerja pencerucukan. Akibat kegagalan responden-responden membayar tiga tuntutan progresif oleh perayu berjumlah RM1,433,500.10, perayu memfailkan tuntutan bagi jumlah tersebut di Mahkamah Tinggi. Responden-responden menafikan tuntutan tersebut dengan menghujahkan bahawa terdapat kecacatan dalam kerja-kerja pencerucukan dan mendasarkan hujahan mereka selanjutnya kepada perjanjian subkontrak ('perjanjian tersebut') yang didakwa dimeterai oleh pihak-pihak. Responden-responden menghujahkan bahawa menurut perjanjian tersebut, pembayaran kerja-kerja pencerucukan adalah tertakluk kepada aturan pembayaran berturutan di mana perayu hanya akan dibayar selepas responden-responden menerima pembayaran-pembayaran interim daripada majikan. Tidak dipertikaikan bahawa perjanjian yang dicadangkan dihantar kepada perayu hanya selepas perayu mengemukakan tuntutan pertamanya. Surat tersebut, yang mengepilkan bersama-sama perjanjian yang dicadangkan tersebut, mengkehendaki agar perayu menandatangani dan memulangkan kesemuanya kepada responden-responden. Walau bagaimanapun, perayu tidak bersetuju dengan terma-terma perjanjian yang dicadangkan dan atas alasan itu, tidak menandatangani serta memulangkan kesemuanya kepada responden-responden. Mahkamah Tinggi menolak tuntutan dan dengan itu, rayuan ini. Isu yang berbangkit bagi pemutusan mahkamah adalah sama ada perjanjian yang tidak ditandatangani tersebut telah mengikat pihak-pihak.

**Diputuskan (membenarkan rayuan; mengenepikan penghakiman Mahkamah Tinggi)**
**Oleh Idris Harun HMR menyampaikan penghakiman mahkamah:**

**(1)** Terma-terma, seperti yang dicadangkan dalam perjanjian tersebut, secara fakta dan undang-undang, tidak membentuk satu perjanjian sah yang mengikat antara pihak-pihak. Perayu tidak mempunyai kewajipan untuk menerima terma-terma yang tidak dipersetujuinya. Perjanjian yang dicadangkan, di bawah undang-undang, kekal sebagai draf tanpa sebarang kesan yang sah.

**(2)** Isu berkenaan perjanjian tersebut telah dibincangkan dengan lanjut dan telah diputuskan dalam *Duta Wajar Sdn Bhd v. Pasukhas Construction Sdn Bhd & Anor* [2012] 4 CLJ 844. Prinsip *res judicata* terpakai kepada rayuan ini dan responden-responden dikecualikan daripada membangkitkan isu yang sama buat kali kedua dalam guaman yang sama.

**(3)** Pembelaan responden-responden mengenai dakwaan aturan pembayaran berturutan atau bayar apabila dibayar adalah berdasarkan perjanjian yang dicadangkan sepenuhnya dan tiada apa-apa lagi. Tidak terdapat

secebis keterangan yang boleh menyokong kes responden-responden mengenai isu ini. Oleh kerana perayu enggan menandatangani perjanjian yang dicadangkan, kesimpulan logik yang boleh dibuat daripada tindakan ini adalah tidak terdapat perjanjian bertulis yang wujud berdasarkan aturan pembayaran berturutan antara pihak-pihak.

**(4)** Tiada keterangan yang menunjukkan bahawa pihak-pihak telah bersetuju dengan tempoh atau masa yang ditetapkan di mana responden-responden dikehendaki membayar tiga tuntutan progresif yang dibuat oleh perayu atau sama ada ia merupakan niat pihak-pihak untuk menjadikan masa sebagai intipati kontrak agar kes boleh terjumlah di bawah ruang lingkup s. 56(1) Akta Kontrak 1950. Tanpa keterangan sedemikian, kes ini kelihatan seolah-olah seperti masa bukanlah intipati kontrak dan dengan itu, prinsip am undang-undang kontrak mewajibkan kontrak tersebut dijalankan dalam masa yang munasabah. Oleh kerana perayu telah melaksanakan perjanjian tersebut dengan kadar kecepatan yang munasabah serta telah mengemukakan tiga tuntutan progresif pada tiga masa berbeza, responden-responden sepatutnya, di bawah undang-undang, menghormati perjanjian tersebut dengan membayar kepada perayu dalam masa yang munasabah.

**(5)** Responden-responden, melalui tindakan mereka, memperakui bahawa kerja-kerja pencerucukan telah dijalankan dengan memuaskan oleh perayu. Semasa progres kerja-kerja pencerucukan, responden-responden tidak membangkitkan isu-isu kecacatan kerja-kerja pencerucukan. Sebaliknya, mereka kekal diam membisu. Responden-responden tidak boleh kini berdalih dan menghujahkan bahawa kerja-kerja pencerucukan tersebut defektif. Tambahan lagi, pembelaan responden-responden dilemahkan lagi dengan kegagalan untuk mengemukakan sebarang keterangan atau mengemukakan sebarang butiran atau laporan perunding-perunding atau pakar-pakar untuk menunjukkan kecacatan yang didakwa.

**Case(s) referred to:**

*Antah Schindler Sdn Bhd v. Ssangyong Engineering & Construction Co Ltd [2008] 3 CLJ 641 CA* ***(refd)***

*Duta Wajar Sdn Bhd v. Pasukhas Construction Sdn Bhd & Anor [2012] 4 CLJ 844 CA* ***(foll)***

*Farrell v. Secretary of state for Defence (1980) 1 All ER 166* ***(refd)***

*Ganam Rajamany v. Somoo Sinniah [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123 FC* ***(refd)***

*Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA* ***(refd)***

*Jamshed Khodaram Irani v. Burjorji Dhunjibhai (1915) LR 43 IA 26 (PC India)* ***(refd)***

*Jetara Sdn Bhd v. Maju Holdings Sdn Bhd [2007] 3 CLJ 41 CA* ***(refd)***

*Kanagasabai Satkuru v. United Malayan Banking Corporation Bhd [1981] 1 LNS 74 FC* ***(refd)***

*Visage Continental Sdn Bhd v. Smooth Track Sdn Bhd [2007] 6 CLJ 570 CA* ***(refd)***

**Legislation referred to:**

Arbitration Act 2005, s. 10

Contracts Act 1950, s. 56(1)

*For the appellant - R Thayalan (Ashokvijay J Sanghrajka with him); M/s Leela A Sanghrajka & Assocs*
*For the respondents - Alfred Lai; M/s Gideon Tan Razali Zaini*

*[Editor's note: For the High Court judgment, please see Duta Wajar Sdn Bhd v. Pasukhas Construction Sdn Bhd & Anor [2014] 1 LNS 411.]*

*Reported by Najib Tamby*

## JUDGMENT

**Idrus Harun JCA:**

**[1]** By a letter of acceptance dated 7 August 2007, one MTM Millenium Holdings Sdn Bhd ("the employer"), awarded a construction project known as "Cadangan Pembangunan Resort Mewah Di Atas Lot 1594, Mukim Sungai Karang, Cherating, Pahang Darul Makmur" ("the project") to the respondents.

**[2]** The respondents subsequently, by way of a 'Invitation To Quote' letter, invited the appellant to submit a quotation for the subcontract to supply and install piles ("the piling works") for the project. After a third revised quotation dated 1 August 2007, as the evidence reveals, the respondents decided to appoint the appellant as the subcontractor for the piling works. The appellant agreed to carry out the piling works for a provisional sum of RM1,496,895. This evidence is not disputed.

**[3]** In addition, the undisputed agreed facts gleaned from the records of appeal show that upon the respondents' instruction the appellant commenced the piling works on 27 August 2007 based on the price quoted by the appellant, completing it on 15 November 2007. The appellant subsequently submitted in respect of the piling works done, three progress claims dated 26 September 2007, 26 October 2007 and 19 November 2007 respectively amounting to RM1,433,500.10 to the respondents. The respondents also received the audit confirmation of the amount from the appellant's accountant. However, no payments were made by the respondents to the appellant for the piling works carried out by the latter.

**[4]** The appellant in consequence filed the instant suit before the High Court seeking the following reliefs:

(a) The sum of RM1,433,500.10 and interest of 8% thereon from 20 November 2007 until the date of full settlement;

(b) Loss of profit from the sub-contract piling works;

(c) Special and general damages;

(d) Costs; and

(e) Other or further reliefs as the court deems just and fit.

**[5]** After a full trial, the learned judge dismissed the appellant's claim. Hence, the appellant appeals to this court. A

**[6]** The main thrust of the defence argument is that the payment for the piling works at all material times was always subject to back-to-back payment arrangement where the appellant would only be paid after the respondents received interim payments from the employer. The respondents' rebuttal to the appellant's claim is premised on its averment in para. 9 of the amended statement of defence that the subcontract agreement purportedly entered into between the appellant and the respondents contained such agreed payment arrangement. The subcontract agreement referred to in para. 9 of the amended statement of defence is the one that was sent by the respondents to the appellant by its letter dated the 16 October 2007. It is not disputed that the proposed subcontract agreement was sent to the appellant only after the appellant submitted its first claim. However, PW1 in his evidence testified that the appellant did not agree with the terms of the proposed subcontract agreement and for that reason did not sign nor return the same to the respondents. B C D

**[7]** It is observed that the letter which enclosed the proposed subcontract agreement requires the appellant to sign and return the copies thereof to the respondents. Before we go more closely into this issue, we think a brief comment on the effect of this letter is appropriate at this juncture. Perusal of the contents of this letter appears to show by implication that it gave the option to the appellant either to sign and return the copies to the respondents, or it could choose not to sign it and if the appellant did not sign it, there was no necessity to return the said document to the respondents. The appellant, as it turned out, did not sign nor return the document to the respondents. E F

**[8]** It is important to note that apart from the draft subcontract agreement there is not an iota of evidence, documentary or otherwise, which shows that the payment for the piling works carried out by the appellant would be paid in this manner. Accordingly, a pertinent question to ask is whether the unsigned subcontract document binds the parties, the answer to which is in our view decisive of this appeal. We accede to the argument urged for the appellant that the parties had not agreed to such a term at all. The terms as proposed in the subcontract agreement in fact and in law, do not constitute a valid binding agreement between both parties. Further, we must emphasise that the appellant is under no obligation to accept terms that it could not agree to. Such proposed subcontract agreement in law remains only as a draft without any legal effect. G H

**[9]** Thus, with due respect to the learned trial judge, while conceding that the subcontract agreement was not formally executed, Her Ladyship had seriously fallen into error when she agreed with and accepted the submission of the respondents that the appellant was bound by the terms and conditions of the proposed subcontract agreement. I

**[10]** Our attention has been drawn to the fact that the Court of Appeal in *Duta Wajar Sdn Bhd v. Pasukhas Construction Sdn Bhd & Anor* [2012] 4 CLJ 844 which involved the same parties herein, had already made a final and conclusive finding on this issue when the respondents filed an application before the High Court to stay all proceedings in this action pursuant to s. 10 of the Arbitration Act 2005 which application was, after being dismissed by the Senior Assistant Registrar, on appeal allowed by the learned High Court Judge.

**[11]** The learned High Court Judge in that case in allowing the appeal was of the view that there was a subcontract agreement subsisting between the parties and that there was acceptance of cl. 10 thereof to refer the dispute to arbitration although the plaintiff did not sign the subcontract agreement. His Lordship found support for the finding of acceptance of cl. 10 of the sub-contract agreement on the conduct of the plaintiff in bidding for and proceeding with the works. On appeal, Hishamudin Mohd Yunus, JCA delivering the judgment of the court said:

> [18] The draft (sub-contract) agreement (containing the arbitration clause - clause 10) was sent to the plaintiff by the defendants on 16 October 2007 and received by the plaintiff on 17 October 2007; but the plaintiff refused to sign the agreement as it disagreed with the terms of the proposed sub-contract.
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> [19] The defendants dispute the plaintiff's claim (made *via* the three progress claims) and seek to refer the dispute to arbitration pursuant to the said cl. 10.1 of the alleged sub-contract agreement ...
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> [20] It is not disputed that the alleged sub-contract document relied upon by the defendants remains unsigned, and that the plaintiff had never informed the defendants whether it was agreeable or otherwise to the terms of the proposed sub-contract agreement.
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> [21] On the facts, we are of the view that there is no arbitration agreement in writing existing between the parties. If there is no arbitration agreement in writing in existence between the parties, then the question of a stay of proceedings pending arbitration under s. 10 of the Act does not arise.
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> [22] However, this does not mean that there is no contractual relationship between the parties. On the evidence, there is. Significantly, this contractual relationship existed even before 27 August 2007. But there is no evidence that this sub-contract is in writing. It is pursuant to this sub-contract that the plaintiff commenced work on 27 August 2007; and thereafter submitted its progressive claims to the defendants.
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> [23] Since there is already in existence a contract (ie, a sub-contract) between the parties, the defendants cannot later impose another agreement on the plaintiff said to be a formal written sub-contract and to have been entered into (or deemed) to have been entered into) on 16 October 2007 by the parties - unless, of course, the plaintiff agrees to be bound by this latter written agreement. But the plaintiff had declined to be a party to this second contract because it disagreed with the terms. It had refused to sign it.

**[12]** We are entirely in agreement with the above judgment. Even though the issue in the above case involved the status of cl. 10 of the proposed sub-contract agreement while in the present appeal cl. 4 of the same draft sub-contract document comes under close scrutiny, the effect, in our view, is still the same. It is clear beyond doubt that from the amended statement of defence, the respondents' defence of the alleged back-to-back payment or pay-when-paid arrangement is based wholly on the proposed subcontract agreement, nothing else. There is not one shred of evidence which can support the respondents' case on this issue. It follows therefore that since the appellant refused to sign the proposed subcontract agreement, the logical conclusion that can be drawn from this act is that there is no written sub-contract agreement in existence based on the draft subcontract document nor is there an agreement on the alleged back-to-back payment arrangement between the parties.

**[13]** Additionally, in the face of the Court of Appeal's ruling in the above case, in our opinion it is beyond question that the issue relating to the sub-contract agreement had already been fully ventilated by the respondents and determined in the said case. That being the case, the principle of *res judicata* affirmed in the case of *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104 applies to the present appeal and the respondents are precluded from raising the same issue a second time in the same suit.

**[14]** Be that as it may, even if, assuming for a moment, that the draft sub-contract agreement is valid, the appellant was not precluded from pursuing the claims in the manner it did as neither the "pay-when-paid" clause nor the draft subcontract restrict the appellant from doing so. We find support in this regard the case of *Antah Schindler Sdn Bhd v. Ssangyong Engineering & Construction Co Ltd* [2008] 3 CLJ 641; [2008] 3 MLJ 204 wherein the Court of Appeal, in considering the effect of the "pay-when-paid clause", held that the 'pay-when-paid' clause did not disallow the plaintiff from pursuing its claim, on account of there being no bar preventing it.

**[15]** Reverting to *Duta Wajar*'s case, we observe that the Court of Appeal had, in its finding stated concisely that the contractual relationship existed even before the appellant commenced its piling works on 27 August 2007. PW1's witness statement shows that the parties did not sign any agreement before the appellant commenced the piling works on 27 August 2007 and that it was the respondents who had verbally instructed the appellant to do so. During cross-examination, PW1 testified that the parties had an oral agreement but confirmed that there was no back-to-back payment arrangement. He further testified that after the receipt of the proposed sub-contract document, the appellant continued with the piling works because it was already 94% complete. On the 'Invitation To Quote Letter' letter, PW1 testified during cross-examination that the attachment to the letter was part of the bill of quantity for the piling works.

**[16]** The evidence showing the contractual relationship between the respondents and the appellant can be summarised as follows:

(a) The respondents invited the appellant to submit a quotation for the sub-contract piling works;

(b) The respondents accepted the appellant's third revised quotation dated 1 August 2007;

(c) The respondents appointed the appellant as the subcontractor for the pilling works;

(d) The respondents verbally instructed the appellant to commence the piling works;

(e) The 'Invitation To Quote' letter uses the word 'agreement' indicating that the contractual document lies in the said letter with the bill of quantity attached thereto forming an integral part of the subcontract agreement; and

(f) PW1's evidence that there was oral agreement for the piling works.

Accordingly, after considering the totality of the evidence and the surrounding circumstances of the case, it is patently clear that the irresistible conclusion which can be drawn therefrom is that the contractual relationship existed between the respondents and the appellant relating to the piling works and that there is no back-to-back payment arrangement agreed between the parties.

**[17]** We are fully aware that, save for the fact that the work commenced on 27 August 2007 and by the respondents' own admission in its statement of agreed facts as well as through DW2's testimony in the course of cross-examination that the work was completed on 15 November 2007, there is no evidence to show that the parties had agreed on any specified period or time during which the respondents were required to pay for the three progress claims made by the appellant or whether it was the intention of the parties to make time as the essence of the contract so that the case could plainly come within the ambit of s. 56(1) of the Contracts Act 1950 (Act 136). In the absence of such evidence, in our opinion, this case appears to indicate that time is not of the essence of the contract and accordingly the general principle of contract law enjoins the execution of the contract to be carried out within a reasonable time thereafter. In the instant action, as the appellant had performed the subcontract with sufficient promptitude and submitted three progress claims on three different occasions, it behoves the respondents in law to honour the subcontract by paying the appellant within a reasonable time thereafter (see *Ganam Rajamany v. Somoo Sinniah* [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123; [1984] 2 MLJ 290 FC; *Jamshed Khodaram Irani v. Burjorji Dhunjibhai* (1915) LR 43 IA 26 (PC India)).

**[18]** For the foregoing reasons, with respect, we come to the conclusion that the learned trial judge had erred in misapprehending the evidence and the law when finding that the proposed subcontract agreement, although unsigned by both parties, contained the terms of payment on the pay-when-paid basis. Under the circumstances, the respondents' defence of the alleged payment arrangement must fail.

**[19]** We shall next deal with the respondents' defence of the alleged defective piling works. Perusal of the amended statement of defence clearly shows that this allegation is not a pleaded issue. In the event, the allegation of defective piling works must be rejected for want of pleadings. In law, the issue raised by the respondents must be an issue raised by the pleadings. It is a cardinal principle of law that a judge is bound to decide a case on the issues on the record (see *Kanagasabai Satkuru v. United Malayan Banking Corporation Bhd* [1981] 1 LNS 74; [1981] 2 MLJ 23 FC). The House of Lords in *Farrell v. Secretary of state for Defence* (1980) 1 All ER 166 lucidly explained the significance of pleadings as follows:

> ... the primary purpose of pleadings is to define the issues and thereby inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it, it is bad law and bad practice to shrug off a criticism as "a mere pleading point".

**[20]** It must also be pointed out, lest it be said we overlook it, that the issue of defective works is not pleaded in the statement of defence, neither was it raised by the respondents at all at any stage of the execution of the sub-contract. At no time did the respondents issue any letter regarding the alleged defects during the progression of the piling works or thereafter, nor did the respondents raise the issue after the appellant submitted the three progress claims to them. It was only during arbitration proceedings between the respondents as claimants and the employer as respondent that this issue of defective works was raised for the first time, however, not by the respondents, but the employer. In fact, payment for the piling works is one of the reliefs sought by the respondents in its claim against the employer in the arbitration proceedings. The employer on the other hand counterclaimed against the respondents claiming damages in respect of the piling works alleging defective piling works. Thus, it was never the respondents' complaint so to speak. Furthermore, the testimony of PW1 reveals that the respondents had witnessed the piling works and confirmed the piling records. Therefore, it can safely be inferred that the respondents by their conduct, had acknowledged that the piling works were satisfactorily carried out by the appellant. The respondents cannot now turn round and say the piling works are defective.

**[21]** During the arbitration proceedings, according to the appellant's counsel, the respondents took the position that the piling works were in fact properly carried out and the final award of the arbitrator shows that the respondents submitted that the employer was not entitled to damages on the

piling works as it was unable to prove the fact and actual loss. We have studied in detail the final award made by the arbitrator in the arbitration proceedings and are satisfied that the arbitrator did make a finding that there was no evidence adduced by the employer to justify its claim for damages for the piling works as such dismissed the claim. In fairness to the appellant, the respondents should not now be permitted to act inconsistently on this issue. We think under the circumstances it is appropriate in this case to apply the *maxim quod approbo non reprobo* that is to say a party should not be permitted to approbate and reprobate. The conduct of the respondents is indeed unconscionable and plainly unfair (see *Visage Continental Sdn Bhd v. Smooth Track Sdn Bhd* [2007] 6 CLJ 570; [2008] 1 MLJ 101 CA).

**[22]** The respondents' defence is further weakened by its failure to adduce any evidence or produce any particulars of, or tender any reports of consultants or experts showing, the alleged defects. As the allegation of defects came from the employer the respondents should have called a witness from the employer to confirm the alleged defects. However, the respondents chose not to do so and understandably too it could not have done so as it was consciously aware that the alleged defective piling works as claimed by the employer was dismissed by the arbitrator. The respondents' defence on this issue is devoid of any merit and therefore must be rejected.

**[23]** We were pressed by the argument of learned counsel for the respondents that the piling works performed by the appellant were subject to the employer's approval and certification. In his submission, learned counsel for the respondents contended that there was no certificate of practical completion issued by the employer pursuant to the letter of acceptance dated 7 August 2007, in respect of the piling works. The letter of acceptance in this regard is actually a letter of award wherein it was expressed to be a binding contract between both the respondents and the employer until a formal contract agreement was executed. Learned counsel for the appellant on the other hand, pointed out that the contract between the respondents and the employer had been terminated subsequently on 22 November 2007 by the respondents obviously after the appellant had completed the piling works. This is supported by the final award of the arbitrator which found that the respondents had terminated the contract and claimed that the employer had breached the contract. The respondents had accepted the award of the arbitrator including the amount for the piling works. If we may add here, the fact that the award was made shows that the arbitrator was satisfied that the piling works had been carried out properly. Therefore, the question of there being no certificate of practical completion is no longer relevant. We agree with learned counsel's submission that having the benefit of the award of the arbitration in the respondents' favour, the respondents cannot now deny the appellant the benefit arising from the piling works properly done by it that enabled the respondents to obtain the award.

**[24]** PW1 in his testimony said that the appellant had brought in money for piling machine equipment and workforce to complete the job despite the fact that the appellant did not get the money that was promised. The respondents' refusal to pay the appellant had obviously denied the appellant of the payment for the works done thereby depriving the appellant of its commercial lifeblood. The respondents, while persistently refusing to pay the appellant had, in the present action, raised the issues of defective piling works and want of certification but during the progression of the piling works, did not raise these issues with the appellant at all. Instead, they maintained a deafening silence. Perhaps the case below may best sum up the respondents' attitude or conduct in the whole episode in handling the appellant's progressive claims in this case. The case in question is *Jetara Sdn Bhd v. Maju Holdings Sdn Bhd* [2007] 3 CLJ 41 where Hasan Lah, JCA writing the judgment of the Court of Appeal said:

> The learned counsel for the appellant also cited the case of *Neale v. Richardson* [1938] I AII ER 753 where the English Court of Appeal held that *the lack of a certificate was not a bar to the Appellant's right to recover the balance of money due* ... It is to be noted that *the respondent did not respond to those letters. As such the respondent's silence on this matter could be taken to mean that the respondent had agreed that the defective works have been rectified.* In *David Wong Hon Leong v. Noorazman bin Adnan* [1995] 4 CLJ 155 at p 159 Gopal Sri Ram, JCA said:
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> > During argument, we registered our surprise at the learned judge's reluctance to enter judgment for this sum of RM100,000. **After all, the appellant had failed to respond to the letter of 17 December 1991.** If there had never been an agreement as alleged, it is reasonable to expect a prompt and vigorous denial. But as we have pointed out, there was no response whatsoever from the appellant.
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> ... In spite of all these the learned judge failed to take heed the advice given by Lawton LJ in *Ellis Mechanical Services Ltd v. Wates Construction Ltd* [1978] 1 Lloyd's Rep 33 at p 36:
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> > If the main contractor can turn round, as the main contractor has done in this case, and say "Well, I don't accept your account; therefore, there is a dispute", that dispute must be referred to arbitration and the arbitration must take its ordinary long and tedious course. **Then the sub-contractor is put into considerable difficulties; he is deprived of this commercial lifeblood.**

**[25]** Finally, we shall address the issue of the actual value of the piling works which was disputed by the respondents in the course of the appeal. The appellant is claiming for the total sum of RM1,433,500.10 on the three progress claims. The sum claimed is supported with documents and this is not rebutted by the respondents in the course of the trial. However, the respondents claimed that between them and the employer the piling works were agreed at RM1,864.887.80 and that the arbitrator awarded the sum of RM1,414,768.15 for the piling works. There was, the respondents argued, a discount of 30% from the above agreed amount and this is also an indication

that at least 30% of the piling works was defective. This contention in our view, is completely without any basis. The respondents relied on a letter dated 13 November 2007 written by Technipro Consult Sdn Bhd to the employer revising the rationalised amount of the bill of quantity in respect of the piling works at RM1,864,887.80 to support their claim. However, the respondents did not call any witness from the employer to confirm whether it had accepted the said rationalised sum. The respondents' reliance on DW1's testimony is of little assistance, because being the writer of the letter, he was called only to confirm it. This letter we observe merely mentions the amount as one of the proposals to the employer. There is no evidence adduced by the respondents to show that the employer had accepted the proposals contained in the said letter. Furthermore, as admitted by DW1 he was not the quantity surveyor for the project and in the first paragraph of the letter it is stated that the quantity surveyor who worked out the details in respect of the rationalised amount was one Ridzudin bin Omar who unfortunately was not called to testify. Therefore, the figure of RM1,864,887.80 as being the agreed amount between the respondents and the employer has not been satisfactorily established.

**[26]** In any event, as we have mentioned earlier, in the arbitration award, the employer's counterclaim of defective pilings was rejected by the arbitrator. Under the circumstances, the respondents' submission that the discount of 30% from the sum of RM1,864,887.80 was allowed at RM1,414,768.15 for defective works is untenable. The truth of the matter is that the arbitrator had allowed the sum of RM1,414,768.15 for the piling works on the basis of the calculation put forward by the employer's witness at the arbitration proceedings namely the quantity surveyor of the project one Mr. Yaw Chan Leong, who had done the final measurement for the piling works in the sum of RM1,414,768.15. The said final measurement was not rebutted by the respondents, accordingly the arbitrator accepted the piling works at RM1,414,768.15. It is abundantly clear that the arbitrator, in allowing the sum, did not do so on the basis of a reduction of 30% for the alleged defective piling works as contended by the respondents.

**[27]** In any event, this issue of the sum of RM1,864,887.80 purportedly to have been agreed between the respondents and the employer is not pleaded in the statement of defence.

**[28]** Under the circumstances, we reject the respondents' defence on this issue as well.

**[29]** In conclusion, we are satisfied that the appellant on the balance of probabilities has proved its case against the respondents. We allow this appeal and set aside the judgment of the High Court. As regards the sum claimed by the appellant, we cannot ignore the arbitrator's award to the respondents of the sum of RM1,414,768.15 which was made after carefully considering the final measured value of the piling works as accepted by him.

Thus, after taking this award into account, we think it is appropriate to enter judgment for the appellant in terms as prayed in the amended statement of claim in para. 14(a) and (b) on the reduced sum of RM1,414,768.15 and interest at the rate of 5% from date of judgment of the High Court ie, 13 December 2013 until full satisfaction and costs of RM50,000 here and below to be paid by the respondents. Deposit shall be refunded to the appellant.

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